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Invoking What Rule?

Michael Flynn*

The sequestration of witnesses has been a part of Florida trial practice since at least 1906.¹ The purpose of the sequestration rule is to “avoid the coloring of a witness’s testimony by that which he has heard from other witnesses.”² By “invoking the rule,” the court in a criminal or civil case can insure that the testimony of each witness stands on its own and is not influenced, tainted or purposefully altered because of other witness testimony.³ The procedure at common law for “invoking the rule” at trial was simple. A lawyer for either side of a case simply asked the judge to “invoke the rule.”⁴ Then the court, in its discretion, immediately ruled to grant or deny the request for sequestration of prospective witnesses.⁵ Ordinarily, the court granted the request for sequestration absent a showing of extraordinary circumstances.⁶ This process for “invoking the rule” was fast, fair, and inexpensive. The Florida courts still use this process for the sequestration of potential witnesses during a trial.⁷ But the application of the rule of sequestration to deposition proceedings remains unsettled.

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1. WILLIAM R. ELEAZER & GLEN WEISSENBERGER, *FLORIDA EVIDENCE: 1999 COURTROOM MANUAL* 425 (1999). See generally *Seaboard Air Line RY v. Smith*, 43 So. 235 (Fla. 1907) (holding that sequestration was a matter of judicial discretion by trial court, undisturbed unless there was evidence of abuse of that discretion).

2. *Spencer v. State*, 133 So. 2d 729, 731 (Fla. 1961).

3. *Dardashti v. Singer*, 407 So. 2d 1098, 1099 (Fla. 4th Dist. Ct. App. 1982). The trial court has an additional consideration in sequestration of a witness during a criminal trial: the balancing of the defendant’s Sixth Amendment right of confronting and cross-examination of witnesses. See *Wright v. State*, 473 So. 2d 1277 (Fla. 1985); *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982); *Dumas v. State*, 350 So. 2d 464 (Fla. 1977).

4. ELEAZER & WEISSENBERGER, *supra* note 1, at 425. Although no written rule was yet adopted, “invoking the rule” or “the rule” was commonly known among Florida attorneys and judges as the rule of sequestration. *Id.*

5. *Randolph v. State*, 463 So. 2d 186, 191 (Fla. 1984).

6. *Id.*

7. *Dardashti*, 407 So. 2d at 1100. The court in *Dardashti* quoted *Spencer v. State*, an often cited case for the common law rule of sequestration: “‘Ordinarily, when requested by either side, the trial judge will exclude all prospective witnesses from the courtroom’” during the trial. *Id.* at 1099 (quoting *Spencer v. State*, 133 So. 2d 729, 731 (Fla. 1961)). The court used the language “ordinarily exclude” to mean that not excluding prospective witnesses will only occur

The application of the rule of sequestration to depositions first surfaced in Florida in the Fourth District Court of Appeal case of *Dardashti v. Singer*.⁸ In that case, the plaintiff filed a complaint for breach of contract against a defendant.⁹ The defendant, in his answer, denied the existence of a contract with the plaintiff.¹⁰ Through interrogatories, the defendant learned that the plaintiff's wife planned to testify in support of her husband's claim.¹¹ The district court noted that the plaintiff's wife's testimony was the only corroborating testimony offered by the plaintiff and was therefore, essential to substantiate the husband's claim.¹² The *Dardashti* court found, unlike the trial court, that permitting the plaintiff's wife to sit in on the deposition of her husband would clearly prejudice and compromise the plaintiff's wife's testimony.¹³ Based on this finding, the district court reversed the trial court ruling and granted the defendant's request to "invoke the rule" and exclude the plaintiff's wife from attending her husband's deposition.¹⁴ In so ruling, the Fourth District Court of Appeal held that the same considerations apply to invoking the rule of sequestration at a trial and a deposition.¹⁵

It is important to note that the district court did not rely on any *Florida Rule of Evidence* in making this decision.¹⁶ Rather, the *Dardashti* court relied on the basic premise used to support the application of the rule of sequestration in any context, namely, the need for untainted testimony.¹⁷ The court, in its critical analysis of *Spencer v. State*¹⁸ which denied witness sequestration in a criminal case, reasoned that the failure to apply the sequestration rule to depositions would not only permit influenced, tainted, and altered deposition testimony, but also threaten the integrity of a trial on

upon a showing of "extra ordinary circumstances." *Id.* at 1100. In other words, the general rule after *Dardashti* is that either party should grant exclusion of a witness in a deposition upon the request of the other party.

8. 407 So. 2d 1098 (Fla. 4th Dist. Ct. App. 1982).

9. *Id.* at 1099-1100.

10. *Id.*

11. *Id.* at 1100.

12. *Id.*

13. *Dardashti*, 407 So. 2d at 1100. ELEAZER & WEISSENBERGER, *supra* note 1, at 425. Although no written rule was yet adopted, "invoking the rule" or "the rule" was commonly known among Florida attorneys and judges as the rule of sequestration. The court noted: "[t]o have it otherwise would emasculate the rule of exclusion and sequestration of witnesses and subject the trial courts to attack alleging collusion among witnesses." *Dardashti*, 407 So. 2d at 1100 (quoting *Thomas v. State*, 372 So. 2d 997, 999 (Fla. 4th Dist. Ct. App. 1979)).

14. *Dardashti*, 407 So. 2d at 1099-1100.

15. *Id.*

16. *Id.*

17. *Id.*

18. 133 So. 2d 729 (Fla. 1961).

the merits.¹⁹ Simply stated, the *Dardashti* court decided that upon the request of either party at the deposition, the rule of sequestration of potential witnesses should apply.²⁰

Eight years later, the First District Court of Appeal chose not to apply the rule of sequestration to depositions in a medical malpractice case.²¹ In *Smith v. Southern Baptist Hospital*,²² the plaintiff sought to sequester an eyewitness doctor from attending the deposition of the defendant doctor.²³ The *Smith* court, while never questioning the reason for the plaintiff's request to "invoke the rule," stated that the common law rule of sequestration only applies to trial proceedings and not depositions.²⁴ The court further ruled that Rule 1.280(c) of the *Florida Rules of Civil Procedure*, which sets out the procedure for obtaining protective orders during the discovery stage of a lawsuit, dictates the procedure and legal standard for a lawyer to "invoke the rule" at a deposition.²⁵ Based on this finding, the district court then ruled that the court in *Dardashti* had no legal authority for its decision.²⁶ If the *Smith* court is right, the procedure for "invoking the rule" in a deposition just became more time consuming, less immediate, and more costly.

The *Smith* court recognized that its decision was in direct conflict with the decision in *Dardashti* and certified this conflict to the Supreme Court of Florida in 1990.²⁷

Meanwhile, the Florida Legislature meandered into the witness sequestration in depositions debate, while waiting for the Supreme Court of Florida's decision on the subject. For its part, the Florida Legislature enacted section 90.616(1) of the *Florida Statutes* for inclusion as part of the *Florida Rules of Evidence*.²⁸ Section 90.616(1) of the *Florida Statutes* states in pertinent part that "at the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses . . ."²⁹ The good

19. *Dardashti*, 407 So. 2d at 1100 (citing *Spencer v. State*, 133 So. 2d 729, 731 (Fla. 1961)).

20. *Id.*

21. *Smith v. Southern Baptist Hosp.*, 564 So. 2d 1115 (Fla. 1st Dist. Ct. App. 1990).

22. 564 So. 2d 1115 (Fla. 1st Dist. Ct. App. 1990).

23. *Id.* at 1115.

24. *Id.* at 1117. The court noted not only that *Dardashti* had no legal authority for its decision but also that the reasoning is not applicable to depositions but only to trials. *Id.*

25. *Id.*

26. *Smith*, 564 So. 2d at 1117.

27. *Id.* at 1118. The court granted the Motion for Certification of Direct Conflict. *Id.*

28. FLA. STAT. § 90.616 (1999).

29. *Id.* The rest of the rule reads:

(2) A witness may not be excluded if the witness is:

(a) A party who is a natural person.

news about this statute is that the legislature explicitly makes the sequestration of potential witnesses mandatory upon the request of a party and implicitly supports the traditional reasons for “invoking the rule.”³⁰ While the statute resolves some questions, it prolongs the debate about whether the sequestration rule applies to depositions. The use by the legislature of the word “proceeding” is too imprecise. The use of the word “proceeding” suggests that the legislature did intend to apply this rule of evidence to proceedings other than trials.³¹ Yet the legislature does not define the word proceeding either in the statute or in the legislative history of the statute.³² Does “proceeding” mean only evidentiary hearings?³³ Is voir dire a “proceeding” within the meaning of the statute?³⁴ What about summary judgment or preliminary injunction hearings?³⁵ Is a deposition a proceeding? How is a practitioner to know what to do?

First, if one would apply the statutory construction rule that a court should apply the procedural or evidentiary rule most on point, it would seem

(b) In a civil case, an officer or employee of a party that is not a natural person. The party's attorney shall designate the officer or employee who shall be the party's representative.

(c) A person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause.

(d) In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such a person's presence to be prejudicial.

Id.

30. *See id.*

31. *See id.*

32. The Senate Staff Analysis and Economic Impact Statement of section 90.616 of the *Florida Statutes* employs the word “proceeding” in a description of the statute but never defines it. Senate Staff Analysis and Economic Impact Statement for Senate Bill 1350 (1990). In describing sequestration of a law enforcement officer in a criminal proceeding, the Statement quotes *Randolph v. State* for trial sequestration. *Id.* (quoting *Randolph v. State*, 463 So. 2d 1098 (Fla. 4th Dist. Ct. App. 1982)). The Statement also cites *Dardashti* for the proposition that sequestration is a matter of right. *Id.* (citing *Dardashti v. Singer*, 407 So. 2d 1098 (Fla. 4th Dist. Ct. App. 1982)). Also note that the Statement does not disclaim the *Dardashti* application of sequestration rule to depositions. Could this be implicit legislative approval of the result in *Dardashti*?

33. By using “proceeding,” the legislature is tacitly approving a line of cases in criminal law. Sequestration is utilized in voir dire; *see Randolph v. State*, 562 So. 2d 331 (Fla. 1990); *Davis v. State*, 461 So. 2d 67 (Fla. 1984); and suppression hearings; *see Bryant v. State*, 656 So. 2d 426 (Fla. 1995); *Bundy v. State*, 455 So. 2d 330 (Fla. 1984). Question: if the legislature is putting a stamp of approval on these cases, did the legislature in the process also approve of *Dardashti*? If not, at least the door is certainly open for its application to depositions.

34. *See* FLA. STAT. § 90.616 (1999).

35. *See id.*

that Rule 1.280(c) of the *Florida Rules of Civil Procedure* should apply to "invoking the rule" at a deposition.³⁶ This means that a party will be required to set for hearing a motion for a protective order to sequester potential witnesses from a deposition.³⁷ However, since the term "proceeding" is not defined by the legislature, a court might decide that the term is ambiguous and open to interpretation.³⁸ If the term "proceeding" is ambiguous, then a court may turn to sources other than the statute's language for guidance.³⁹ In that case, the Florida courts would look to the directly conflicting decisions of the *Dardashti* and *Smith* cases for guidance.⁴⁰ Then, any court would be further confused because the Supreme Court of Florida has never ruled on the certification of these two directly conflicting appellate decisions.⁴¹

Acknowledging the good intentions of the legislature in attempting to clarify the rule of sequestration and the Supreme Court of Florida's benign neglect in ruling on the certification for appeal based on the legislature's enactment, lawyers must feel a little unsettled about the sequestration rule. Simply stated, a Florida lawyer should take the time and spend the money to use *Florida Rule of Civil Procedure* 1.280(c) concerning protective orders to "invoke the rule" in deposition proceedings. It seems such a shame to add the sequestration of prospective witnesses from a deposition to the list of time consuming, inefficient and costly tasks for judges, lawyers and litigants. Perhaps this is one instance where that curious Florida practice of "invoking the rule" was better off left alone, without judicial or legislative intervention.⁴²

36. FLA. R. CIV. P 1.280(c). As a rule of statutory construction, the statute that is on point controls over another statute that merely refers to or speaks more generally to the issue. *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994) (citations omitted). The statute on point is considered an exception to the general principles of the broader statute. *Id.* (citations omitted).

37. Rule 26(c) of the *Federal Rules of Civil Procedure*, similar to Rule 1.280 of the *Florida Rules of Civil Procedure*, requires a protective order to exclude witnesses from a deposition. Rule 26(c)(5) provides, in pertinent part: "the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that discovery be conducted with no one present except persons designed by the court." *Id.*

38. *Cf. State v. Egan*, 287 So. 2d 1, 4 (Fla. 1973) (citations omitted).

39. *Id.* Where a statute utilizes clear language, a court may not interpret any terms and must enforce the statute as it is written. *Id.* However, an ambiguity could be the springboard from which courts may interpret section 90.616 of the *Florida Statutes* to apply to depositions.

40. *Dardashti*, 407 So. 2d 1098 (Fla. 4th Dist. Ct. App. 1982); *Smith v. Southern Baptist Hosp.*, 564 So. 2d 1115 (Fla. 1st Dist. Ct. App. 1990).

41. *See Smith*, 564 So. 2d at 1115.

42. *See Randolph v. State*, 463 So. 2d 186 (Fla. 1984); *Spencer v. State*, 133 So. 2d 729 (Fla. 1961); *Seaboard Air Line RY v. Smith*, 43 So. 235 (Fla. 1907); *Dardashti v. Singer*, 407 So. 2d 1098 (Fla. 4th Dist. Ct. App. 1982).